

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**TREVCON CONSTRUCTION CO., INC.,
REICON GROUP LLC,
URBAN FOUNDATION/ENGINEERING LLC,
GENERAL CONTRACTORS ASSOCIATION
OF NEW YORK, INC.**

Employer,

and

**DOCKBUILDERS LOCAL OF AMALGAMATED
CARPENTERS AND JOINERS UNION**

Petitioner

and

**NEW YORK CITY DISTRICT COUNCIL
OF CARPENTERS**

Intervenor.

**Cases 22-RC-70080
29-RC-70402
29-RC-70380**

**PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF EXCEPTIONS TO
HEARING OFFICER'S REPORT ON OBJECTIONS TO ELECTION**

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PRELIMINARY STATMENT

This memorandum of law is submitted by Petitioner Dockbuilders Local of Amalgamated Carpenters and Joiners Union (“Petitioner” or “Amalgamated”) in support of its exceptions (“Petitioner’s Exceptions”) to the report (the “Report”) issued by Hearing Officer Joseph Calafut (the “Hearing Officer”) with respect to two objections (“Petitioner’s Objections”) Petitioner filed with the Board regarding the election (the “Election”) which took place between March 9 and 23, 2012, and was won by Intervenor New York City District Council of Carpenters (“Intervenor” or the “District Council”).

As discussed in detail below, the bases of Petitioner’s Exceptions, briefly stated, are as follows:

1. Although the Hearing Officer purported to base his Report on credibility findings -- and, in particular, on his finding that only the testimony of Michael Bilello (“Bilello”), the District Council’s Executive Secretary-Treasurer (“EST”) was to be credited, and all testimony inconsistent with Bilello’s testimony (including testimony by other witnesses called by the District Council) was to be ignored -- the Hearing Officer committed legal error when he totally failed to take into account evidence as to which the testimony of both Amalgamated and District Council witnesses (including Bilello) were consistent; and in so doing, he failed to consider critical facts.
2. Although the Hearing Officer purported to base his Report on the theory that the challenged conduct was simply permissible

electioneering on the part of one union (the District Council) involved in a representational contest, the Hearing Officer totally failed to take into account facts supported by uncontradicted evidence -- including in particular Bilello's dual role as both the District Council's EST and Co-chair of the Board of Trustees of the District Council's benefit funds -- which transformed conduct which otherwise might have been "mere electioneering" into conduct that could be, and was, perceived as a threat to deprive workers of benefits if they selected Amalgamated as their bargaining representative; and the Hearing Officer committed legal error when he concluded that the Bilello threats were insufficient to set aside the Election.

3. Although the Hearing Officer enumerated the factors on which the Board has relied in determining whether to require a new election in a representation contest, the Hearing Officer totally failed to apply those factors to the evidence presented at the Hearing, and never took into account the uncontradicted testimony of Amalgamated witnesses with respect to the dissemination and impact of Bilello's statements and conduct. For example, he failed to allow testimony with respect to banked hours during the election for the proposition that they were eliminated for the purpose of convincing would be voters that Bilello in his dual role could

deliver on his threats; and in so doing, the Hearing Officer failed to consider critical facts and committed legal error.

SUMMARY

Petitioner's Objections related to actions taken, statements made, and material distributed, by the District Council during the critical period between December 2, 2011 (when Amalgamated filed its petition for an election in this case) and March 23, 2012 (when balloting was concluded). Those actions and statements included (a) the elimination of medical coverage to which workers would otherwise have been entitled pursuant to the District Council's Welfare Plan, and (b) the threat that if Amalgamated won the Election, the District Council's Pension Fund would not transfer, or would long delay any transfer of, any money to which Amalgamated's pension plan might be entitled.

The above actions were taken, and the above statements were made, by the District Council's Executive Secretary-Treasurer ("EST") Michael Bilello ("Bilello"), who was also the Co-chair of, and effectively controlled, the District Council's Welfare Plan and Pension Fund (collectively, the "DC Benefit Funds") and by District Council's President William Lebo, who was also a Trustee of the District Council Benefit Funds; and, as described in detail below, such actions and statements had an immediate and substantial impact on the workers who were entitled to vote in the Election.

In his Report, the Hearing Officer recommended that both of Petitioner's Objections be overruled. In support of his decision, the Hearing Officer held that any statements made by Bilello or contained in material distributed by the District Council, were mere electioneering, part of "permissible give-and-take campaigning" (**Report** at

13); and that the issues of whether such statements were true or false, or contained misstatements of law, were not issues about which the Board would be concerned. (**Report** at 12, 14) Although the Hearing Officer, at the outset of his Report, enumerated the factors which the Board takes into account in evaluating whether objectionable conduct is sufficient to warrant setting aside an election (**Report** at 3, 4, citing *Cedars-Sinai Medical Center*, 342 NLRB 596, 597 (2004)), the Hearing Officer did not analyze whether such factors were present here, relying instead on his conclusion as to the “electioneering” nature of the challenged conduct.

Amalgamated has now taken exceptions to the Hearing Officer’s Report, and those exceptions (“Petitioner’s Exceptions”) are being filed concurrently herewith. As set forth in detail below, the Hearing Officer ignored the fact that much of that conduct involved not merely statements of the District Council’s position as to the effect on workers’ benefits of selecting Amalgamated as their bargaining representative, but action that Bilello and/or Lebo had already taken, or that Bilello threatened to take in the future -- by virtue of his dual positions as Co-chair of the District Council Benefit Funds and as the District Council’s EST -- significantly limiting the medical insurance and pension rights that workers would have should Amalgamated be selected. Significantly, the evidence with respect to such conduct did not depend on any credibility finding by the Hearing Officer, but was undisputed. Given that evidence, the Hearing Officer’s conclusion that Bilello’s conduct was not objectionable, and his failure to evaluate whether such conduct warranted setting aside the Election and the ordering of a new election, was error which should be reversed by the Board.

STATEMENT OF FACTS

The Election

Pursuant to the petition Amalgamated filed with the Board on or about December 2, 2011, an election was held in early March 2012 and balloting in such election was concluded on March 23, 2012. According to a Revised Tally of Ballots, there were 186 votes in favor of the Amalgamated and 361 votes in favor of the District Council -- so that a change of 88 votes from the District Council to the Amalgamated would tip the election in favor of the Amalgamated; and the Revised Tally also indicated that there were 160 undetermined challenged ballots. **Exh. P-5**

Petitioner's Objections

On April 5, 2012 Petitioner filed objections with respect to the Election. Thereafter, Petitioner withdrew all of its objections except for the following two objections:

2. On numerous occasions from January through March 2012, District Council representatives, including the Executive Secretary-Treasurer and President of the District Council, threatened bargaining unit members with the immediate loss of medical benefits, and the cancellation of retiree medical benefits, if the Dockbuilders Local won the representation election, despite the rules of the District Council Welfare Plan prohibiting such actions. These threats were made at a meeting of Local 1556 of the United Brotherhood of Carpenters and Joiners of America (the dockbuilder local) in February 2012, during the course of a HAZMAT training class attended by dockbuilders in February 2012, and at jobsites throughout New York City and New Jersey.
3. At the local 1556 meeting in February 2012, District Council representatives threatened bargaining unit members with the loss of their pension benefits if the Dockbuilders Local won the election. Specifically, the District Council Executive Secretary-Treasurer told the bargaining unit members in attendance (approximately 80-90) that he would never transfer pension fund

monies from the District Council Pension Plan to a new union pension plan if the Dockbuilders Local won the election.

Although one of the objections which Petitioner withdrew (Objection No. 4) specifically concerned a modification in February 2012 of the Welfare Plan (pursuant to which any participant who worked under a non-District Council collective bargaining agreement would forfeit all of his “banked” hours, and would lose eligibility for benefits under the Plan on the last day of the quarter in which he worked), the District Council itself introduced evidence with respect to such modification of the Welfare Plan (Kalick, 237/9-24. **Exh. P-2**); and such evidence, which is discussed below, is clearly relevant to the ability of Bilello and the District Council to follow through on, and implement, the threats generally described in Objection No. 2, that workers would immediately lose medical benefits if they selected Amalgamated as their bargaining representative.

On September 12, 2012 the Regional Director issued a Report on Objections and Notice of Hearing directing that a hearing be held before a Hearing Officer for the purpose of receiving evidence to resolve the issues raised by the above objections.

The Hearings

Hearings were held before the Hearing Officer on October 5, 9 and 15, 2012 (the “Hearings”), during which the testimony of eleven individuals was taken. Details of the testimony, and references to the relevant pages in the transcript of the Hearings, are set out below at pages 8 to 20; briefly, however, those proceedings may be summarized as follows:

Six witnesses testified on behalf of Amalgamated, including: Eric Gundersen, James Wright, Eugene Basile, Richard Ostrander, Eric Henderson and Shawn Doyle. In

particular, and as described in detail below, Amalgamated's witnesses testified, among other things, that during the course of a Hazmat training course that was held on February 4, 2012 (the "Hazmat course") and during the course of a membership meeting of Local 1556 that was held on February 28, 2012 (the "February Meeting"), Bilello informed those in attendance that -- contrary to what they might have been told by Amalgamated -- if Amalgamated were selected workers would face an immediate loss of medical benefits, and there would be no transfer of any money from the District Council's Pension Fund to any pension fund established by Amalgamated.

Five witnesses testified on behalf of the District Council, including: Joseph Geiger, Laura Kalick, Christopher Parzych, Louis Rioux and Michael Bilello. In particular and as described in detail below, the District Council witnesses also testified with respect to Bilello's statements at the Hazmat course and the February Meeting; and although they denied that Bilello had used certain words attributed to him by the Amalgamated witnesses, they agreed that Bilello had indicated that there would be a loss of medical benefits if Amalgamated was selected, and that there would be no transfer of money from the District Council Pension Fund to any pension fund established by Amalgamated, or that any such transfer would be a long time in coming about.

Although there was a conflict in the witnesses' testimony with respect to the exact words spoken by Bilello, there was no conflict with respect to certain critical issues, including: (a) Bilello's dual role as District Council EST and Co-chair of the District Council Benefit Funds; (b) the threat to take away medical benefits; and (c) the threat not to transfer, or to deliberately delay the transfer, of money from the District Council Pension Fund to any pension fund established by Amalgamated. As further described

below, there were glaring deficiencies in the Hearing Officer's Report, including the following:

(a) despite the Hearing Officer's rejection of the testimony of certain of Amalgamated's witnesses, he failed to consider the testimony of other Amalgamated witnesses, and failed to consider the similarity of testimony between the District Council and the Amalgamated witnesses;

(b) the Hearing Officer failed to consider the damage of Bilello's utterances, even if one were to reject allegation that Bilello had used the expression "over my dead body" when talking about the transfer of money from the District Council Pension Fund;

(c) the Hearing Officer failed to consider the impact of statements by someone such as Bilello who wore "two hats," both as District Council EST and as Co-chair of the Benefit Funds, and the perception that voters would have with respect to Bilello's ability to make good on any threats.

Bilello's Roles as District Council EST and Co-chair of the Benefit Funds

Michael Bilello was the District Council's Executive Secretary Treasurer ("EST") and its highest official, who had full oversight over all District Council departments. Bilello 322/14-21. ¹Bilello was also a trustee and the Co-chair of the District Council's Benefit Funds, including its pension fund (the "DC Pension Fund"). Although there are 12 trustees of the District Council Benefit Funds (6 union and 6 employer trustees), there is bloc voting, with the union trustees on the one hand, and the employer trustees on the other hand, each constituting a single bloc. Bilello 325/10-12.

Bilello admitted that the union trustees when they are wearing their "union hat" are all under his supervision. Bilello 403/3-13. He further admitted that he has influence

¹ References are to the witness and the page/line in the Hearing transcript.

over the other trustees. Bilello 404/19-22. As a practical matter, Bilello controlled the District Council Benefit Funds or, at the very least, was in a position where he could effectively veto any action that might be taken by them.

The Hazmat Course

On February 4, 2012 members of the District Council were scheduled to attend a mandatory eight (8) hour Hazmat refresher course to renew their certification in handling hazardous material. Basile 93/15-18; Doyle 159/25, 160/1-5. Although eight (8) hours are mandated for completion of the Hazmat refresher course, approximately only four (4) hours dealt with that subject (Basile 94/1-3), while the other four (4) hours were spent addressing the District Council Benefit Funds and issues relating to the Amalgamated Dockbuilders. Basile 94/4-10.

Bilello and Lebo were also in attendance. Doyle 160/23-25, 161/1-4; Basile 95/11-25. Messrs Bilello and Lebo were identified as Co-chair and Trustee, respectively, of the District Council Funds. See **Exh. P-1**, Basile 160/23-25, 161/1-4.

Lebo was the first to address the group, and he advised that Dockbuilders would lose their benefits if they chose to leave the District Council. Basile 95/13-25. Bilello also addressed the group and advised in an intimidating manner the approximately sixty (60) to ninety (90) attendees (90% which were dockbuilders) that he would never sign the check transferring any of the District Council's pension assets to the Amalgamated Dockbuilders which would be done only over "his dead body," and that they would lose

their welfare banked hours. Doyle 161/5-13, Basile 97/23-25; 96/8-19, 97/1-2, 98/1-10.²

Mr. Bilello's comments at the Hazmat class had a chilling effect, since the attendees understood his comment as jeopardizing their livelihood. Basile 96/15-17.

The February Meeting

The February 28, 2012 meeting was attended by Bilello and two other District Council officials (Bill Lebo and Mike Cavanaugh) (Kalick 234/5-8). Significantly, Bilello also arranged for three (3) representatives of the District Council Benefit Funds to be present: Joe Epstein, Funds Director; Laura Kalick, Interim Executive Director; and Ralph Chetcuti, Director of Human Resources. Bilello 401/18-21, Kalick 233/17-24. Although these individuals ostensibly were present for the purpose of answering questions from the membership with respect to benefits, none of them addressed the meeting, and only Bilello spoke to the attendees. Kalick 234/9-13. Bilello 401/25, 402/1-6. Their presence gave the appearance to the attendees that the positions taken by Bilello reflected actions taken by the Trustees of the District Council Benefit Funds, which was not the case. In effect, Bilello was using the silent personnel of the District Council Benefit Funds -- all of whom were supposed to take their direction from the Board of Trustees of District Council Benefit Funds as a whole -- to signal to the attendees that he was speaking on behalf of, and with the approval of the District Council Benefit Funds, even though that was not the case.

² Before March 1, 2012 welfare participants of the District Council banked their hours, 250 hours per quarter Bilello 330/14-21, but the funds changed the grounds in which a member could forfeit his/her banked hours. This occurred during the course of the election. See Exh. P-2. Bilello 330/3-5, 331/2-5 and discussion at pages 11 to 13.

The Evidence with Respect to Medical Insurance

One part of Bilello's presentation to the membership involved a change to the rules with respect to members' eligibility for Welfare Plan coverage. Under the rules previously in effect, a member of a District Council union was eligible for medical insurance benefits after having worked 250 hours in covered employment -- i.e., work for which the member's employer was required to contribute to the Welfare Plan on the member's behalf pursuant to a collective bargaining agreement with the union. Any hours in excess of 250 in a three-month period, and any hours fewer than 250 hours in a calendar quarter, however, could be "banked" (up to a total of 750 hours) for future use, so that a worker could remain eligible for coverage even though he did not work 250 hours in covered employment in a particular quarter.

According to Ms. Kalick, at the February meeting, Bilello read to the membership a "Summary of Material Modification" (the "February 28 SMM," **Exh. P-2**) which announced a change in this policy. When an Amalgamated witness had previously testified that this document had been distributed at the February meeting and that the attendees had felt threatened by it (Gundersen 23/20 to 24/8), the District Council's lawyer objected to its introduction (on the ground that the document related to an objection (Objection No. 4, which specifically related to the elimination of "banked" hours) which had been withdrawn (Gundersen 26/3-10)); but the Hearing Officer admitted it for the "limited purpose" of showing Bilello's authority. Gundersen 26/11-23. Significantly, however, it was the District Council itself, through its own witnesses (Kalick, and later Bilello -- see Bilello 330/13 to 331/12) that introduced evidence with respect to the February 28 SMM and its implications. Whatever objection the District

Council might have had to any discussion of the February 28 SMM, therefore was waived by the District Council, and such document can, and must, be considered as part of the evidence in this case.

Under the new rule announced for the first time in the February 28 SMM, effective March 15, 2012 a member's bank hours would be permanently forfeited if he worked in "Disqualifying Employment" -- i.e., work within the trade jurisdiction of any local union affiliated with the District Council for an employer who was not required to contribute to the Welfare Plan on such employee's behalf. The February 28 SMM further provided that an employee had to notify the Welfare Plan in writing immediately and by no later than five (5) days after his first day of work in Disqualifying Employment, and that if he failed to provide such notice and the Welfare Plan provided benefits to the employee or his eligible dependents, the employee would be required to reimburse the Welfare Plan for the amount of such benefits and would be permanently ineligible for future coverage under the Welfare Plan, including future retiree coverage. Kalick 237/9-

24. **Exh. P-2**

Although, according to Ms. Kalick, Bilello did not introduce the February 28 SMM before reading from it, that document was immediately recognized by the membership attending the February meeting as a significant cut back in the rights that they previously enjoyed; indeed, according to Ms. Kalick, the membership reacted with "general grumbling" (Kalick 237/25 to 238/7); and this is consistent with Gundersen's testimony that the attendees felt threatened by the new policy. Gundersen 23/20 to 24/8

The February 28 SMM had ostensibly been adopted by the Welfare Plan because of an "ongoing problem" that the Welfare Plan had because of the decrease of "man-

hours” (i.e., contributions to the Welfare Plan), which Geiger said the Welfare Plan’s trustees had discussed “over the past couple of months, several months.” Geiger 197/20-25. Indeed, Bilello himself testified that the District Council had lost “considerable market share (Bilello, 396/11-21), a problem which, presumably had not appeared overnight, but had developed over a long period.

It is clear, however, that the sudden appearance of the February 28 SMM and the elimination of “banked hours” had more to do with fact that the District Council was now engaged in a contest with Amalgamated than it did with any longstanding problem with respect to a loss of man-hours and market share. Indeed, Bilello made sure to emphasize to the membership the significance of the new policy with respect to banked hours in connection with the Election which was a week away, for as Geiger testified, Bilello told the membership that “if Amalgamated was to win and the members were to go over with Amalgamated their medical would end at the end of that quarter because they’re no longer -- no longer represented by the District Council, who’s giving them that medical plan.” Geiger 198/6-11. See also Parzych 252/9-15. Moreover, just so that there could be no confusion on this point, the District Council arranged for copies of the February 28 SMM to be handed out at the February meeting and also mailed out to the membership. Gundersen 23/20-24. Ostrander 117/5-9.

The Evidence with Respect to the Transfer of Money from the Pension Fund

Another issue at the February meeting was whether the District Council Pension Fund would transfer money to any new pension fund established by Amalgamated. Amalgamated’s Organizing Committee had retained a law firm, Spear Wilderman, and that firm had prepared an Agreement and Declaration of Trust for a defined benefit

pension plan (along with a proposed Agreement and Declaration for an Amalgamated Dockbuilders Health and Welfare Fund), all of which was disclosed in a February 8, 2012 memo from that firm (the “Spear Wilderman Memo”) to Amalgamated. See Exh. I-2 with Spear Wilderman Memo attached.

The Spear Wilderman Memo clearly set out Amalgamated’s intention to offer a defined pension plan to its members, and noted that ERISA mandates the transfer of both assets and liabilities of active employees in the District Council’s pension plan to any new plan that is established to receive them. Spear Wilderman also advised the Organizing Committee that it would not be difficult to establish a new pension and health and welfare fund and that the proposed Agreement and Declaration for the Amalgamated Dockbuilders Health and Welfare Fund (which Spear Wilderman had already drafted on or before February 8, 2012) would enable retirees to participate in the new fund. See Exh. I-2 with Spear Wilderman Memo attached. Gundersen 65/18-21, 66/6-8, 67/9-10, 67/16-18, 67/19-22, 68/6-14 Ostrander 131/11-17, 132/4-8, 133/22-24.

Bilello saw and reviewed Exh. I-2 sometime in February 2012 but before the February meeting. Bilello 339/13-23. Despite the Spear Wilderman Memo, Bilello advised the attendees of the February 28, 2012 meeting that the pension assets would not follow the Amalgamated Dockbuilders if they won the election.

Bilello put forth varying reasons why such a transfer would not be made by the District Council Pension Fund: Several times, he emphasized that he was a fiduciary of the Pension Fund and that, as such, he could not and would not allow a transfer of money to a 401(k) plan (even though he knew that Amalgamated was going to have a defined benefit pension fund, and not a 401(k) plan). Bilello 339/24 to 341/3; 347/7-24; 395/21

to 396/10; 414/1 to 415/7. See also Geiger 195/25 to 196/10; 210/17-24; Parzych 253/16-22.

On other occasions, Bilello admitted that, as far as he was concerned, it did not matter whether Amalgamated would have a defined benefit pension plan, because in any event there would be protracted litigation with respect to the amount that had to be transferred. Bilello 414/22-25, 415/1-3. See also Geiger 196/19 to 197/5; 212/23 to 213/1. Bilello's position, and threats, were further reflected in the Spivak Lipton Memo. (See **Exh. I-6**).

Although any decision with respect to a transfer of funds from the District Council Pension Fund to the Amalgamated Dockbuilders pension fund described in the Spear Wilderman Memo would have to be approved by both the union and the employers trustee of the DC Pension Fund, Bilello never discussed the Spear Wilderman Memo or the Spivak Lipton Memo discussed below with the employer trustees. (Bilello 404/19-22, 405/1-4, 405/25, 406/1-5) Bilello advised union members on various occasions that he would never sign the check transferring some pension assets to an Amalgamated pension plan if the latter won the election, leading them to believe that he had authority to make such a decision on his own. Bilello 412/22-25, 415/1-3; Basile 97/23-25, 98/1-10; Wright 75/14-23; Ostrander 116/4-9; Gundersen 22/16-20; Kalick 235/18-25; Parzych 252/16-22.

Because Bilello was both the EST of the District Council and the Co-chair of the District Council Benefit Funds, there could be no doubt among the membership that Bilello had the power to do exactly what he said he would do with respect to the District Council Benefit Funds. Wright 82/25, 83/1-9; Basile 104/19-22, 104/23-25, 103/2-5;

Henderson 141/1-7, 141/11-19; Ostrander 116/10-12. In fact, as noted above, at the outset of the February meeting, Bilello informed the membership of the SMM regarding the forfeiture of “banked hours” that the Welfare Plan has just issued and was going to implement while the Election was still being conducted -- which was a powerful message with respect to Bilello’s ability to carry out his threats with respect to pension rights as well as welfare benefits.

After obtaining a copy of the Spear Wilderman Memo, Bilello requested the District Council’s counsel, James Murphy, of the Spivak Lipton firm, to prepare a response, which Mr. Murphy did in the form of a memorandum (the “Spivak Lipton Memo,” **Exh. I-6**) dated February 27, 2012, on the subject of “Pending Dockbuilders Election” addressed to Bilello, William S. Lebo and Michael P. Cavanaugh. Lebo is the President, and Cavanaugh is a Vice President, of the District Council; and Lebo and Cavanaugh are also union trustees of the District Council Benefit Funds. **Exh. I-6**. Bilello 392/13-25, 393/1-2.

The Spivak Lipton Memo described Amalgamated Dockbuilders’ promise to have a pension plan (as described in the Spear Wilderman Memo) as a “cruel hoax” upon the Dockbuilders and their families. Bilello 394/1-8 395/13-15. Without any evidence, and despite specific evidence in the Spear Wilderman Memo to the contrary, the Spivak Lipton Memo -- and Bilello, who agreed with it -- assumed that Amalgamated would not have a defined benefit pension plan, but would have a 401(k) plan. Bilello 395/21-25.

Other statements in the Spivak Lipton Memo that were contradicted by the Spear Wilderman Memo, and that were used to support the District Council’s campaign against

Amalgamated were that if Amalgamated succeeded, “workers and their families would be left with no welfare plan for medical and hospitalization coverage and would have no defined benefit plan...for future pension benefits;” that “Amalgamated has represented publicly that it has no intention to establish such defined benefit plans, suggesting instead that Dockbuilders would be left with making contributions from their wages to a 401(k) plan;” that “(e)ven if the Amalgamated were to change its position on establishing defined benefit welfare and pension plans, it would first have to establish such trust funds and plans, which can take several years;” that receipt by a new Amalgamated Dockbuilders Pension Fund of assets of the existing Carpenters Pension Fund was “unlikely” and would not take place “for many years” and that no Amalgamated Dockbuilder multi-employer defined benefit pension plan was “likely to exist for years or ever.” **Exh. I-6** at 1, 2, 3 and 4.

Significantly, the Spivak Lipton Memo did not indicate that the Spivak Lipton firm only represented the District Council and did not represent any of the District Council Benefit Funds; however, the memo specifically noted that the Spivak Lipton firm represented numerous other benefit plans (**Exh. I-6** at 5), which might well lead Local 1556 members to conclude that it was representing the District Council Benefit Funds in this matter as well.

Bilello directed that the Spivak Lipton Memo be handed out to all attendees of the meeting (Bilello 395/16-20); he also directed that the Spivak Lipton Memo be mailed to all Dockbuilders on the Excelsior List, who were also Funds participants. Bilello 400/24-25, 401/1-4. The distribution of the Spivak Lipton Memo thus took place at the “eleventh hour,” at or about the end of February and the beginning of March, almost immediately

before balloting in the Election began, and at a point when it would be difficult, if not impossible, to circulate any meaningful response in opposition to such a document.

The Dissemination and Impact of Bilello's Threats

At the Hearing the Amalgamated witnesses presented extensive evidence that the statements that Bilello had made, and the threats he had delivered, at the February meetings immediately impacted the support that Amalgamated had previously enjoyed with the dockbuilders prior to February 2012. Wright 72/23-25, 73/1-4, 74/24-25, 75/1-13, 77/7-9. Bilello's threats with respect to pension rights and the elimination of health benefits (including the announcement of an elimination of banked hours) were discussed at numerous jobsites and were the focus of discussion at all meetings at various locations including but not limited to, Brooklyn, NY, Edgewater, NJ, Long Island, NY, and South Jersey following the February meetings and the distribution of the Spivak Lipton Memo. Wright 77/15-23, 78/5-6, 80/19-25, 81/2-5, 82/25, 83/1-9, 83/10-11; Ostrander 121/21-25, 122/1-6; 124/14-15, 125/21-25, 126/2-16; Doyle 164/1-12; Henderson 145/15-22, 147/11-17, 148/1-22, 149/23-25, 150/24-25, 151/1-10; Basile 101/24-25, 104/1-4; Gundersen 23/3-4, 28/24-25, 29/1-5, 29/14-23, 30/1-6, 30/7-17, 32/4-8, 32/10-25, 33/1-15, 33/20-25, 35/1-15.

Various Amalgamated representatives testified as follows with respect to the impact of Bilello's statements on Local 1556 members.

Eric Gundersen conducted a phone bank and contacted 1,000 dockbuilders; he also visited approximately 100 job sites. Bilello's statements came up in a majority of Gundersen's phone calls, and such statements were also raised by workers at the job sites. Gundersen 33/18-25, 35/1-15. Moreover, at the four to six meetings that Gundersen

attended after the February Meeting, people were terrified as a result of Bilello's statements. Gundersen 29/10 to 30/17.

Richard Ostrander visited 15 to 20 job sites and talked with hundreds of dockbuilders; he also received constant phone calls. Bilello's statements were known to almost everyone Ostrander talked to, and people were terrified that they were going to lose their medical benefits and would not be able to retire at the proper age. Ostrander 124/8 to 125/4, 125/21 to 126/8.

Eric Henderson participated in phone banks both before and after the February Meeting. After the meeting, Bilello's statements was a common topic of discussion in these phone calls, and Mr. Henderson's experience was typical of other phone bankers. Henderson 149/6-25.

Prior to the February Meeting, political meetings were held at various locations with the average member of Dockbuilders in attendance:

Long Island	150 Dockbuilders in attendance
South Jersey (3 meetings)	20 Dockbuilders in attendance
Edgewater (2 meetings)	40-50 Dockbuilders in attendance
Brooklyn (5 or 6 meetings)	80-120 Dockbuilders in attendance

Ostrander 121/12-20

However, Bilello's February actions resulted in a substantial reduction in the number of Dockbuilders attending campaign meetings. Doyle 164/13-17; Henderson 145/11-14; Gundersen 32/10-25, 70/12-14, 16/19; Wright 75/4-13. Dockbuilders contacted following Bilello's February statements and the distribution of the Spivak Lipton Memo confirmed that such actions had a negative psychological impact on would

be voters. Ostrander 126/2-16; Basile 104/19-25, 105/1; Doyle 161/14, 164/1-8, 164/13-17.

On or about March 7, 2012 Bilello, Lebo, and Cavanaugh signed an “Urgent Notice” dated March 7, 2012 for distribution to members (the “Notice,” **Exh. P-3**). The Notice stated in part: “It is very important that you mark an X in the square under NYCDCC to continue your wages and benefits” (Emphasis added.) Some members took the Notice to mean that they would lose their pension and benefits if they did not vote for the District Council, and that Bilello could follow up with his threats. Henderson 143/14-25; Basile 103/6-19.

In March 2012 a meeting of dockbuilders, called by Bilello, was held in South Jersey. Most of the attendees were persons who occupied supervisory positions, including general foremen and people with influence in different areas of South Jersey. At that meeting, Bilello stated that if members left and went with Amalgamated they would lose the ability to retire early with full medical benefits. Bilello 353/7-23. Bilello’s statement completely ignored the fact that, as indicated in the Spear Wilderman Memo, as early as February 8, 2012, counsel for the Amalgamated Dockbuilders had already drafted a proposed Agreement and Declaration for the Amalgamated Dockbuilders Health and Welfare Fund so that a participant in that new fund could include current retirees. **Exh. I-2** at 4, 5.

Significantly, none of this evidence with respect to the dissemination and impact of Bilello’s threats was contradicted or called into question by any evidence submitted by the District Council.

The Report

On November 19, 2012, after receiving post-hearing briefs from the parties, the Hearing Officer issued his Report.

In his Report, the Hearing Officer noted a conflict in the testimony of various witnesses with respect to Bilello's statements at the Hazmat course and the February meeting. In this connection, the Report noted that although Amalgamated's witnesses agreed that Bilello had stated that medical benefits would be terminated in the event of an Amalgamated victory, such witnesses "did not agree as to when Bilello advised that medical benefits would be terminated, or when such termination would become effective -- Gundersen testified that Bilello stated that it would be the day after Amalgamated was certified, Ostrander's testimony was that it would be 'the minute the election was certified,' and witnesses Basile and Doyle provided no specific date." (**Report** at 11.)

By contrast, according to the Hearing Officer, "Bilello testified that if Amalgamated was elected the employees' representative, the employees' coverage would end at the end of the quarter following the selection of the Amalgamated." (**Report** at 11, 12.)

To resolve this conflict, the Hearing Officer made certain credibility findings, particularly with respect to three individuals, one of whom (Bilello) he found to be credible, and two of whom (Messrs. Gundersen and Rioux, who testified respectively, for Amalgamated Dockbuilders and the District Council) he found not to be credible. (**Report** at 10.) The Hearing Officer also held that to the extent that Bilello's testimony contradicted that of other witnesses, he would credit Bilello's testimony. (**Report** at 10, 13, n.7.)

Having credited Bilello's account of what was said regarding health insurance coverage, the Hearing Officer concluded:

With regard to health and welfare fund eligibility, I find that it is not objectionable conduct for the Union representing the employees, herein the Intervenor, to advise employees that its health coverage would be unavailable to employees should it not be selected as their representative. Under such circumstances, a Union is engaged in permissible give-and-take campaigning regarding the merits of unionization and the advantages of the parties' respective health coverage. *JTJ Trucking Inc.* 313 NLRB 1240 (1994). In this regard, I credit the testimony of Bilello as I found it to be straightforward and more reliable than contradictory testimony.* I do not find any credited evidence to support the assertion that during the critical period, Bilello unlawfully asserted that health benefits would be terminated prior to the results of the election being final.** See *Bell Security, Inc.*, 308 NLRB 80 (1992). Credited testimony establishes that Bilello did nothing more than explain the impact of loss of District Council membership on individuals' health insurance coverage.

(Report at 13)

On the question of whether Bilello had stated that he would refuse to transfer funds held by the District Council Pension Fund to a pension fund established by Amalgamated if it won the election (an issue included in Objection No. 3), the Hearing Officer also noted a conflict in the testimony.

According to Amalgamated's witnesses, Bilello had stated -- both during the Hazmat course and at the February meeting -- that there was no way that he would allow any such transfer to take place (**Report** at 5-7, 11). In his Report, however, the Hearing Officer, however, chose to credit Bilello's testimony that he did not recall making any statement at the Hazmat course regarding the transfer of pension funds. (**Report** at 11). The Hearing Officer further noted that although the District Council's own witnesses

* I specifically discredit any testimony inconsistent with my findings.

** I further find the remarks attributed to William Lebo regarding the loss of health insurance benefits not to be objectionable as there is no allegation that Lebo stated that benefits would be terminated prior to the results of the election being final.

“[did] not agree as to what exact reason was specified by Bilello” when he told the members of Local 1556 that he would not transfer pension funds to Amalgamated if it was victorious in the election, he would credit Bilello’s testimony that at the February Meeting he had simply informed the members that “as a fiduciary [of the District Council Pension Fund he] could not transfer assets to anything other than another defined benefit plan in existence, and it would have to meet the qualifications under ERISA law.” (Report at 9)

In the end, however, the Hearing Officer held that, whatever reason Bilello had given for his refusal to allow the transfer of funds to any new Amalgamated pension fund was irrelevant, because it was permissible electioneering, even if based on misstatements of facts and/or law. (Report at 12, 14)

Finally, and as noted above, although the Hearing Officer listed the factors that the Board takes into account in evaluating whether objectionable conduct is sufficient to warrant setting aside an election (see Report at 3, 4), he did not analyze whether such factors were present here; moreover, he did not make any determinations with respect to the dissemination and probable impact of the challenged statements and conduct in this case.

ARGUMENT

Point I

THE HEARING OFFICER DID NOT TAKE INTO ACCOUNT CRITICAL UNDISPUTED FACTS IN THIS CASE

Although the Hearing Officer asserted that he had made credibility findings with respect to the testimony of the various witnesses, and was basing his Report and recommendations on the “credited testimony,” it is clear that the Hearing Officer totally

ignored much of the critical, and undisputed, evidence in this case. Part of the evidence which the Hearing Officer ignored was testimony that was not disputed; other parts of that evidence consisted of documents where credibility was not at issue. Because he ignored such evidence, the Hearing Officer committed legal error, ignored pertinent facts, chose to ignore facts that were collaborated amongst District Council and Amalgamated witnesses, therefore, inter alia, his conclusions must be reversed.

In this case, the undisputed evidence is as follows:

1. Bilello, who was both the District Council's EST and the Co-chair of the Benefit Funds, "wore two hats," and was able to take actions that would have been beyond his ability if he were just a union official.

2. As Co-chair of the Benefit Funds, Bilello could cause such funds to take actions with respect to (i) medical benefits, and (ii) the transfer of funds to any pension fund established by Amalgamated.

3. Lebo was also both the District Council's President and Trustee of the Benefit Funds, wore "two hats" and was able to take action, and in fact threatened to take such action against Amalgamated that was beyond the ability of a mere union official.

4. During the critical period, immediately prior to the Election, Bilello took measures and made statements designed to convince Local 1556 members and prospective voters that he had taken such an action (with respect to medical benefits) in the past, and that he could take such an action (with respect to the transfer of funds to an Amalgamated pension fund) in the future.

5. In the case of medical benefits, such measures included the elimination of banked hours that was put in place for the purpose of persuading members that they

would suffer the loss of a benefit (banked hours) if they selected Amalgamated as their bargaining representative.

6. Members were informed during the critical period, immediately before the Election, both by Bilello's statements at the February Meeting and by the distribution of the February 28 SMM, that the Welfare Plan had put this measure into effect.

7. Members were also informed during the critical period, immediately before the Election, both by Bilello's statements at the February Meeting and by the distribution of the Spivak Lipton Memo, that there would be no transfer of any funds from the Pension Fund to a pension fund established by Amalgamated or that, at the very least, any such transfer would be a long time coming and would involve costly and lengthy litigation.

8. Bilello's threat to prevent, or at the very least to greatly delay, any transfer of money to a pension fund established by Amalgamated was significantly enhanced by the fact that he had just put into place the elimination of banked hours.

9. The above statements were made, and the above documents were disseminated, in a manner (the February Meeting and subsequent mailings) and at a time (a week before start of the balloting in the Election) that were calculated to, and did in fact, have a significant impact on the membership, and that effectively denied Amalgamated opportunity to counter the threats implicit in such statements and documents.

The above facts are not the subject of disputed testimony, the Hearing Officer's credibility determinations are irrelevant to, and do not in any way invalidate, such facts. All such facts should have been taken into account in the Hearing Officer's Report and recommendations. Because they were not taken into account, the Hearing Officer

committed legal error; his conclusions are invalid; and Petitioner's Exceptions to the Report must be sustained.

Point II

THE HEARING OFFICER'S REPORT IGNORED ESTABLISHED PRINCIPLES AND PRECEDENTS WHEN IT HELD THAT THE CONDUCT OF BILELLO AND THE DISTRICT COUNCIL WAS NOT OBJECTIONABLE AND COERCIVE

The Board must set aside the results of an election when the conduct, viewed objectively, has the tendency to interfere with employees' freedom of choice, and could have affected the election. *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995). In recommending that both of Petitioner's Objections be overruled, the Hearing Officer held that neither Bilello's statements with respect to health fund eligibility nor his (and Spivak Lipton's) statements with respect to the transfer of funds to a pension plan to be established by Amalgamated had such a tendency, but were merely "electioneering." For the following reasons, in making such findings the Hearing Officer committed legal error, and Petitioner's Objections to such findings must be sustained.

In the case of the statements with respect to health fund eligibility, the Hearing Officer held that such statements were simply "permissible give-and take campaigning regarding the merits of unionization and the advantages of the parties' respective health coverage" (**Report** at 13); and, in this connection, the Hearing Officer stated that he "[did] not find any credited evidence to support the assertion that during the critical period, Bilello unlawfully asserted that health benefits would be terminated prior to the results of the election being final" (**Report** at 13 (emphasis added), citing *Bell Security, Inc.*, 308 NLRB 80 (1992)).

The Hearing Officer's conclusion ignored undisputed facts and applicable law and precedents. In citing *Bell Security* -- a case in which the Acting Regional Director held that a leaflet distributed by a union (Local 803, which represented certain of the employers employees, and had an interest in defeating petitioner union's election campaign) which stated that a vote for petitioner meant that no health or welfare benefits would be available for another 2 ½ years, was coercive and objectionable -- the Hearing Officer presumably was seeking to distinguish that case (in which a union had threatened an immediate cessation of benefits) with this case (in which the Hearing Officer believed that the District Council, through Bilello, was simply predicting what benefits might be lost in the future if Amalgamated were certified as bargaining representative).

In so doing, however, the Hearing Officer ignored the fact that Bilello had already put into effect, and had announced to the membership -- a week before balloting in the Election was scheduled to begin -- a new policy (the elimination of "banked" hours as set forth in the February 28 SMM) which would guarantee that members would lose medical benefits if Amalgamated were selected as bargaining representative. Such a policy, and Bilello's statements regarding same, were clearly objectionable and coercive. See, in addition to *Bell Security*, supra, *Springfield Jewish Nursing Home For the Aged, Inc.*, 292 NLRB 1266 (1989), in which the administrative law judge held that the statement by an employer's labor consultant "that, in the event of unionization, they would lose their present pension plan and end up with the less generous union plan" violated Section 8(a)(1) of the Act and was objectionable conduct that affected the outcome of the election. 292 NLRB 1275.

In the case of statements with respect to the transfer of pension plan funds, the Hearing Officer held that “it is not objectionable conduct for the Intervenor, here the incumbent Union, by Bilello, to advise employees of the Intervenor’s position that such pension fund assets funds [sic] could not be transferred to a non-existent pension fund of Amalgamated” (**Report** at 13, 14); and, in this connection, the Hearing Officer stated that “[a]ssuming *arguendo* that Bilello’s remarks regarding the transfer of pension funds was not in accordance with ERISA law, a misstatement of the law is not objectionable conduct” (**Report** at 14, citing *John W. Galbreath & Co.*, 288 NLRB 876 (1988).)

Again, the Hearing Officer’s conclusion ignored undisputed facts and applicable law and precedents. As the Board has made clear on numerous occasions -- most recently in *The Permanente Medical Group, Inc.*, 358 NLRB 88, 2012 NLRB LEXIS 450 (2012) -- “[i]t is well established that the Board will not find a threat to be objectionable unless the party has the ability to carry out the threat.” 2012 NLRB LEXIS 450 [* 10], emphasis added, citations omitted.

In this case, the issue was not whether the District Council “by Bilello, [was advising] employees of the [District Council’s] position that such pension fund assets funds [sic] could not be transferred to a non-existent pension fund of Amalgamated.” (**Report** at 13, 14) When Bilello spoke to the employees at the February Meeting and arranged to have the Spivak Lipton Memo distributed to them and the other potential voters in the Election, he was not simply advising them of the District Council’s “position” with respect to a request for a transfer of funds. Rather, as the undisputed evidence makes clear -- and as Bilello himself admitted -- when he took such action he was doing so as a fiduciary -- in fact, as the Co-chair -- of the District Council Pension

Fund; and he was letting everyone know exactly what action the Pension Fund could and would take if Amalgamated was selected as the bargaining representative and sought to have money transferred to its own pension fund. Moreover, by putting into place the February 28 SMM that provided for the elimination of banked hours, and by informing the attendees at the February meeting and distributing the February 28 SMM to potential voters, Bilello further confirmed to all concerned that he could and would use his power at the District Council Benefit Funds to punish employees if they selected Amalgamated.

Whatever right that a District Council representative might have had to “advise” such voters of the District Council’s “position” with respect to the transfer of money from the District Council Pension Fund to an Amalgamated pension fund does not change the fact that Bilello was not just taking action as a District Council representative, but was taking action as the Co-chair of the District Council Pension Fund. Cf. *Willey’s Express, Inc.*, 275 NLRB 631 (1985) in which the Board, reversing the hearing officer, condemned as coercive the actions of a union’s Business Agent (Foley) in (a) bringing pressure on a Benefit Trust to terminate the vision and dental portion of the employer’s insurance program for its non-union employees whom the union was seeking to represent, and (b) informing an employee (Flynn) that the non-union employees were illegally covered under the trust fund. In so holding, the Board noted:

“We find that Foley’s statement to employee Flynn is coercive and reasonably tended to interfere with the election. The statement is objectionable regardless of whether the trust fund coverage for the unit employees is in fact illegal; whether Foley, in another context, otherwise had a right as a union representative to activate an investigation of the Employer’s participation in the fund; and whether any action was taken by the trust fund to terminate such benefits at any time.” 275 NLRB 631. 632.

Bilello clearly had the ability to carry out his threat to prevent any transfer of funds to a new Amalgamated pension fund (or at the very least, to make such a transfer as difficult, prolonged, and expensive as possible), just as he had arranged immediately in advance of the Election for the Welfare Plan to eliminate banked hours. Bilello's statement and conduct -- both with respect to the elimination of banked hours and with respect to the transfer of pension fund money -- were intended as threats; and, as the undisputed evidence clearly establishes, they were clearly understood as such by potential voters. Accordingly, the Hearing Officer erred as a matter of law in finding that such statements and conduct were not objectionable and coercive, and Petitioner's exceptions to the Report must be sustained.

Point III

THE HEARING OFFICER DID NOT APPLY ANY OF THE APPROPRIATE FACTORS IN EVALUATING WHETHER THE CHALLENGED CONDUCT WAS SUFFICIENT TO REQUIRE A NEW ELECTION, AND THE UNCONTRADICTED EVIDENCE ESTABLISHES THAT SUCH CONDUCT WAS SUFFICIENT

Although at the outset of his Report the Hearing Officer enumerated the various factors on which the Board has relied in determining whether to require a new election (see **Report** at 3), he never applied those factors to the facts in this case. Instead, the Hearing Officer apparently relied on his conclusion that the challenged conduct was no more than "mere electioneering" -- a conclusion which, as the above demonstrates, was clearly erroneous and failed to take into account undisputed and uncontradicted evidence in this case.

The Hearing Officer's failure to take into account the relevant factors in evaluating whether a new election is required in this case would, in and of itself, require

the Board to uphold Petitioner's Objections. Moreover, the undisputed and uncontradicted evidence here clearly requires the ordering of a new election:

Bilello's actions were clearly intended to have, and did in fact have, an impact on potential voters in the Election. Bilello's threats were communicated to hundreds of potential voters in various meetings, and were communicated to all of the employees on the Excelsior List through the distribution of the February 28 SMM and the Spivak Lipton Memo. The Spivak Lipton Memo clearly had a negative psychological impact on would be voters: Ostrander 126/2-16; Basile 104/19-25, 105/1; Doyle 161/14, 164/1-8, 164/13-17. Those communications, and the March 7 Notice (**Exh. P-3**) which was signed by Bilello, Lebo and Cavanaugh and was distributed by the District Council, and which clearly threatened that "wages and benefits" would cease if Amalgamated Dockbuilders won the election, all took place during the critical period, immediately before balloting in the Election began.

As the Board has recognized, "statements made during an election campaign can reasonably be expected to have been discussed, repeated, and disseminated among employee, and therefore, the impact of such statements will carry beyond the person to whom they are directed." *United Broadcasting Company of New York, Inc.*, 248 NLRB 403, 404 (1980). The impact of Bilello's actions were already supported by the testimony of a variety of Amalgamated's witnesses. Doyle, 164/13-17; Henderson, 145/11-14; Gundersen, 32/10-25, 70/12-14, 16/19; Wright 75/4-13. There is substantial, and uncontradicted, evidence that this is exactly what happened in this case.

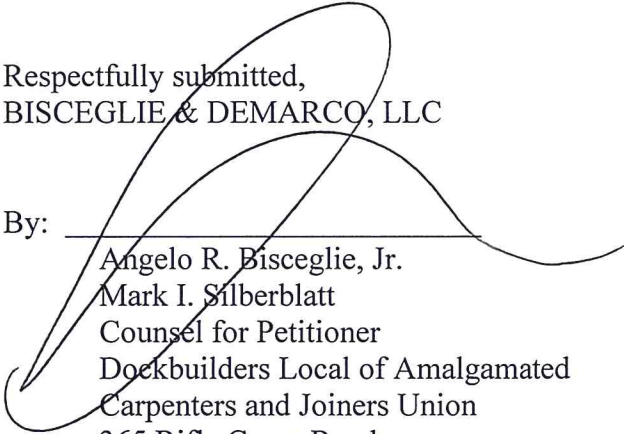
In light of the totality of the District Council's coercive threats by the actions of Bilello/Lebo and others, the Board must sustain Petitioner's Objections pursuant to the standard used to analyze the propriety of electioneering or permissible conduct, a standard that the Hearing Officer never applied to the facts of this case.

CONCLUSION

The Board must sustain the Petitioner's Objections and direct a new election. The Hearing Officer committed grave legal errors, ignored critical facts, and committed gross legal errors on evidentiary rulings in making his recommendation.

Dated: December 17, 2012

Respectfully submitted,
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